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Supreme Court, U.S.

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 389

LIONEL MARQUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A; II R. 28a–32a)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1964. Petitions for rehearing and rehearing en banc were denied on June 16, 1964. By order of Mr. Justice Brennan, the time for filing a petition for a writ of certiorari was extended to and including August 15, 1964. The petition for a writ of certiorari

[1] "R." refers to the printed record which is contained in two volumes. "Tr." refers to the typewritten transcript of the trial proceedings which has been lodged with the Clerk.

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was filed on August 14, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence was sufficient to support the jury's finding that petitioner's violation of the wagering tax statutes was willful.

STATUTES INVOLVED

26 U.S.C. 4401 provides in pertinent part:

> (a) Wagers.
>
> There shall be imposed on wagers * * * an excise tax equal to 10 percent of the amount thereof.
>
> * * * * *
>
> (c) Persons liable for tax.
>
> Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. * * *

26 U.S.C. 4411 provides:

> There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

26 U.S.C. 4412 provides in pertinent part:

> (a) Requirement.
>
> Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—
>
> * * * * *

26 U.S.C. 7203 provides:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who wilfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

26 U.S.C. 7262 provides:

> Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

26 U.S.C. 7272 provides in pertinent part:

> (a) In general.
>
> Any person * * * who fails to register with the Secretary or his delegate as required by this title or by regulations issued thereunder shall be liable to a penalty of $50.

* * * * *

STATEMENT

In a two-count information filed in the United States District Court for the Southern District of New

York, petitioner was charged with willfully failing to pay the special tax on the business of wagering imposed by 26 U.S.C. 4411 and willfully failing to register as a person subject to such special tax as required by 26 U.S.C. 4412. Similar informations were filed against seven other persons who were tried jointly with petitioner. Petitioner was convicted by a jury, was sentenced to imprisonment for six months, was fined a total of $6,000, and was penalized $50. The court of appeals unanimously affirmed (Pet. App. A).[2]

The evidence pertinent to petitioner's contention in this Court may be summarized as follows:[3] In November and December of 1962, a numbers wagering operation was conducted on West 144th Street, between 8th Avenue and Bradhurst Avenue, in New York City. The wagering operations were conducted at two locations on West 144th Street: in the hallway of number 309, a tenement building, and in number 303, a store (II R. 2, 13; Tr. 419). Every day approximately 200 persons entered these two buildings for short visits (II R. 3, 6). Outside the entrance of each of these two buildings, one of the defendants tried with petitioner

[2] A second information charged a conspiracy between petitioner and the seven other defendants to commit the substantive offenses. The trial judge dismissed this charge as against six of the co-defendants, and declared a mistrial as to petitioner and another co-defendant (I R. 39).

[3] All of the recited evidence is condensed from the trial testimony of various agents of the Internal Revenue Service. One operated undercover and placed several bets (II R. 12-14). Others observed the premises in question from a rented room, with the aid of binoculars, a motion picture camera, and a tripod-mounted telescope (II R. 1, 5-6; Tr. 621).

was always posted. If the operators were unsure of a potential customer, his admission to the store might be barred (Tr. 444–445) but, if they knew him, he would be admitted by the person standing outside, and sometimes even encouraged to enter (Tr. 449–450, 459). Upon the appearance of any suspicious stranger in the vicinity, the activities would cease (Tr. 468, 470). Payoffs on winning numbers were made in 309 (Tr. 442, 490, 492).

At regular intervals each day a person would arrive at 309, the man who had been standing outside would enter the building and emerge with a third, and the three of them would meet a similar group at 303. Then some of them, always with one person carrying a metal box, would go around the corner to an apartment building on 8th Avenue (I R. 4; II R. 6, 17; Tr. 497). Sometimes this activity was initiated by a signal from petitioner or another defendant, rather than by the arrival of a person at 309 (II R. 4, 8; Tr. 489–490). Petitioner was observed almost every day as a participant in the activities (I R. 3; II R. 3, 7, 9, 12, 14).

On December 6 petitioner and defendant Pena were observed at one end of the store counter in 303. They were sorting three-by-five-inch slips of paper and arranging them into various piles, while another defendant accepted bets at the other end of the counter. At one point, while the man accepting bets was busy with a customer (the undercover agent), a second customer entered and hurriedly announced that he wished to bet a certain number. Petitioner told the defendant taking bets: "That's all right, Teddy, I will take

care of this one." Petitioner then transcribed on a slip of paper the amount of the bet, the desired number, and the initials of the customer. He accepted the customer's money and placed the slip on one of the piles he had been sorting (I R. 6–8; II R. 14–16).

Later that day, the man posted in front of 303, defendant Hunter, stopped a customer (the undercover agent) who was trying to enter and told him "You can't go in now," pointing to two policemen up the street. Defendant Pena started to emerge from 303 with a metal box, but petitioner, who was also outside the entrance, said "Go back inside with that box until I find out about these fellows." The two police officers entered 307 and 309. Hunter asked petitioner if he knew them, and petitioner replied, "Yes, they are all right." Petitioner then walked over to 309, entered and remained inside a short time. When he returned, he told Hunter, "It's okay to let them again now," and told Pena, "Okay, you can take the box around now" (I R. 8–9).

On December 12 petitioner was observed talking to someone on a "walkie-talkie" radio (Tr. 721–722). On December 22 a police car stopped in front of 303. Someone came out of the store, talked to the driver, then re-entered the building. Petitioner then emerged from the store, talked to the driver, removed something from his overcoat pocket, and handed it through the car window (I R. 4; II R. 8).

On December 23 petitioner approached the man standing in front of 303, took him by the arms and moved him next to the buzzer on the wall of the

building. Petitioner then approached the man standing by 309 and placed him closer to 311. He appeared to speak angrily to both men (I R. 5; II R. 3, 8–9; Tr. 747).

On December 27 petitioner was seen "bawling out" Pena (I R. 5). On December 29 Pena came around the corner and walked up to petitioner at 303. He handed petitioner what appeared to be a "wad of bills." Petitioner then entered an automobile and drove away (I R. 5; II R. 10).

ARGUMENT

The evidence was sufficient to support the jury's finding that petitioner's failure to register and pay the tax was willful. The gambling operation was purposefully concealed as well as possible in view of its nature and scope. All wagers were transacted within the buildings which were guarded by regular shifts of lookouts. Whenever a policeman or stranger appeared in the vicinity, the activity was halted. The evidence showed that the precautionary measures were taken under petitioner's direction. The evidence indicating a proprietary or managerial interest on petitioner's part would have justified conviction for the felony of willfully attempting to evade and defeat the payment of taxes. See *Ingram* v. *United States*, 360 U.S. 672; *United States* v. *Minker*, 312 F. 2d 632 (C.A. 3), certiorari denied, 372 U.S. 953. It was *a fortiori* sufficient to sustain the conviction for the misdemeanor of willfully failing to register and pay the tax.

Petitioner contends that the decision of the court of appeals conflicts with the decision of the Fifth Circuit in *Edwards* v. *United States,* 321 F. 2d 324. But the original *Edwards* decision has been reversed on rehearing *en banc*. *Edwards* v. *United States,* Nos. 19,827 and 19,828, decided July 10, 1964. The original decision in *Edwards* merely rejected the contention that proof of (1) participation in a wagering business and (2) non-payment of the tax would suffice to support a conviction for willful non-payment. The *en banc* opinion considered the evidence supporting the finding of willfulness in that case and sustained the jury's verdict.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1964.

U. S. GOVERNMENT PRINTING OFFICE 1964